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Nos. 93-356, 93-521

In the Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS, INC., *PETITIONER*,
v.
AMERICAN TELEPHONE &
TELEGRAPH COMPANY, et al., *RESPONDENTS*

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, *PETITIONERS*
v.
AMERICAN TELEPHONE &
TELEGRAPH COMPANY, et al., *RESPONDENTS*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL BUSINESS MACHINES CORPORATION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, International Business Machines Corporation ("IBM") respectfully submits this corporate disclosure statement.

IBM is a manufacturer of equipment used with telecommunications services and is a user of such services. IBM has no parent companies, subsidiaries, or affiliates as those terms are used in Rule 29.1.

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL BUSINESS MACHINES CORPORATION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI[1]

IBM respectfully supports the petitions of the United States and the Federal Communications Commission and MCI Telecommunications Corporation for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision of that court in *American Tel. & Tel. Co. v. FCC*, No. 92-1628 (D.C. Cir. June 4, 1993).

[1] Pursuant to Rule 37.2, *amicus curiae* has obtained the written consent of all parties to the filing of this brief.

INTEREST OF AMICUS CURIAE

IBM is a manufacturer of equipment used with telecommunications services and is a substantial user of such services. In both capacities, IBM has a significant interest in the maintenance of a competitive marketplace for telecommunications services. The Federal Communications Commission's forbearance policy (or "permissive detariffing") at issue in this case has proven an effective means of promoting competition in telecommunications services. In reliance on the forbearance policy, IBM has structured its business dealings and made investment decisions on the assumption that the marketplace for telecommunications services would remain and, indeed, become increasingly competitive. IBM participated in the Commission's rulemaking proceeding in which the forbearance policy was reaffirmed. The ruling of the court below would invalidate the Commission's decision.

SUMMARY OF ARGUMENT

This case merits certiorari because the court below substituted its judgment for that of the Commission regarding an ambiguous statutory term in direct contravention of this Court's *Chevron* decision.[2] Certiorari also is appropriate because the issue presented -- the lawfulness of the Commission's longstanding forbearance policy -- has not been resolved by this Court and is of fundamental importance to providers of telecommunications services, manufacturers of telecommunications equipment, and users of the telecommunication system.

The charter of the Federal Communications Commission is "to make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities

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[2] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

at reasonable charges."[3] To implement that mandate, over the last fifteen years the Commission developed a regulatory structure designed to encourage competition in the telecommunications marketplace. A cornerstone of this structure is the Commission's permissive detariffing policy. Under that policy, carriers found to face effective competition may charge prices that have not been incorporated in tariffs filed with the Commission. In the decision below, the U.S. Court of Appeals for the District of Columbia Circuit held this policy to be unlawful. That decision is in direct conflict with this Court's ruling in *Chevron*.

The Commission's interpretation, if not compelled, is at least "permissible" and, as such, is due considerable deference by a reviewing court under *Chevron*.[4] Under the express authority of Section 203(b)(2) of the Communications Act, the Commission may "modify any requirement" of Section 203. The Commission has, in its expert discretion, concluded that its power to modify includes the power to forbear from applying the provisions of Section 203(a), which govern the filing of tariffs by common carriers. This interpretation is consistent with the text of the statute. The lower court's failure to afford due deference to the Commission's interpretation constitutes a fundamental error of administrative law.

The court below decided a question of federal law that is important to carriers, resellers, and users of telecommunications services that has not been, but should be, resolved by this Court. Under permissive detariffing, competition in the telecommunications market has flourished. This competitive environment both has encouraged the development of the most advanced telecommunications sector in the world and, at the same time, has helped ensure that rates remain just and reasonable. The advanced

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[3] 47 U.S.C. § 151.

[4] *Chevron*, 467 U.S. at 843.

telecommunications services elicited by this competitive marketplace have boosted the competitiveness of U.S. industries in international markets.

Certiorari is appropriate here because the lower court's decision, which would require common carriers and hundreds of resellers to file public tariffs, would significantly inhibit competition in the telecommunications industry. Where a monopoly exists, tariffs can be an effective means of protecting consumers and preventing monopolistic abuses. By contrast, if a marketplace is subject to effective competition, tariffing is unnecessary because competitive forces restrain prices. Tariffing also tends to impede the workings of a market. Tariffing imposes additional costs on sellers, inhibits their competitive responses to market trends, and actually creates a risk of collusive pricing. If the decision below is allowed to interpose these impediments to competition in telecommunications, the vitality of the U.S. telecommunications industry will be reduced. That in turn will reduce the competitiveness of other American industries that rely on a competitive telecommunications marketplace.

Important investment and business decisions have been made in reliance on the policy that the lower court's decision would invalidate. Telecommunications users such as IBM have structured their businesses around contracts negotiated with service providers or resellers in a competitive environment. The decision of the court below shrouds the lawfulness of these contracts in uncertainty. Moreover, in future service agreements, market participants would incur significant transaction costs if they had to anticipate and adjust to the more restrictive environment that the decision below would create.

In sum, contrary to the *Chevron* doctrine, the court below invalidated the Commission's permissive detariffing rules. The question of validity of those rules is of great importance to the telecommunications industry and its

customers. The question has not been, but should be, resolved by this Court.

ARGUMENT

I. *In Rejecting the Commission's Reasonable Interpretation of Its Governing Statute, the Decision Below Conflicts with the Ruling of This Court in Chevron.*

This case turns on the meaning of Section 203(b)(2) of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, (the "Act"), which allows the Commission to "modify any requirement made by or under the authority" of Section 203. The Commission has interpreted this section to empower it to make tariff filing permissive for nondominant common carriers.[5] The court below disagreed.[6] As set forth more fully in the petitions for

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[5] *Policy and Rules Concerning Rates and Facilities for Competitive Carrier Services Therefor, Notice of Proposed Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979), *First Report and Order*, 85 F.C.C.2d 1 (1980), *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445 (1981) ("*Competitive Carrier Further Notice*"), *Second Report and Order*, 91 F.C.C.2d 59 (1982) ("*Competitive Carrier Second Report*"), *recon.*, 93 F.C.C.2d 54 (1982), *Second Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 17,308 (1982), *Third Further Notice of Proposed Rulemaking and Third Report and Order*, 48 Fed. Reg. 46,791 (1983), *Fourth Report and Order*, 95 F.C.C.2d 554 (1983) ("*Competitive Carrier Fourth Report*"), *Fourth Further Notice of Proposed Rulemaking*, 96 F.C.C.2d 922 (1984), *Fifth Report and Order*, 98 F.C.C.2d 1191 (1983), *recon.*, 59 Rad. Reg.2d 543 (1985), *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), *vacated and remanded sub nom., MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) ("*MCI v. FCC*").

[6] The court below disposed of the present case by summary order on the ground that the court's earlier decision in *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) ("*AT&T v. FCC*"), *cert. denied*. 113 S. Ct. 3020 (1993), conclusively determined the outcome of the dispute. In the earlier case, the lower court concluded that the Commission's argument in support of permissive detariffing was foreclosed by the analysis in *MCI v. FCC*, 765 F.2d at 1186, in which the court held *mandatory* detariffing unlawful under the Act. However, in

certiorari of the United States and MCI, the lower court violated the principles articulated in *Chevron* by substituting its judgment for that of the expert agency charged with enforcing the Act.

To begin with, the lower court's decision is based on an overly narrow construction of Section 203(b)(2). In that section, Congress provided the Commission with authority to modify "any" requirement of Section 203 save one: The Commission "may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days." 47 U.S.C. § 203(b)(2). The normal inference from the existence of a specific exception to a statutory command is that there are no other exceptions.[7] This inference is buttressed in this case by the expansive language Congress used in conferring the modification authority. Pursuant to Section 203, the Commission may modify "any" requirement in the section at "its discretion." The lower court's conclusion that this authority does not include the power to forbear from applying the tariff filing requirement in certain cases is entirely inconsistent with the statutory language.

Despite the sweeping language of the statute, the court below substituted its own cramped interpretation of Section 203(b)(2) for that of the expert agency charged with implementing the Act. Thus, this presents a quintessential *Chevron* case.[8] The Commission's construction of Section 203(b)(2) is certainly a reasonable one, given the

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MCI the court had expressly declined to reach the question whether the permissive detariffing orders were invalid. *See id.* at 1196. Thus, far from foreclosed by the court's earlier decisions, the Commission's permissive detariffing policy and its underlying rationale never have been the subject of reasoned decisionmaking by any court with the benefit of full briefing and argument.

[7] *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

[8] *See Chevron*, 467 U.S. at 837.

language of the provision and the context in which it appears. Where "the statute is silent or ambiguous with respect to the specific issue," a court must defer to a "permissible" agency construction.[9] This rule reflects the Court's recognition that Congress has entrusted the administration of a regulatory statute to an expert agency, to be overridden by a court only where the agency has clearly exceeded its statutory authority. In failing to accord the Commission's interpretation due deference, the court below contravened a fundamental tenet of administrative law.[10]

II. *This Case Involves an Important Issue of Federal Law That Has Not Been, But Should Be, Resolved by This Court.*

A. Permissive Detariffing Furthers an Important Policy of the Act.

The core purpose of the Act is "to make available . . . to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at reasonable charges."[11] Only fifteen years ago, the monolithic, highly regulated telecommunications industry was making little prog-

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[9] *Id.* at 843.

[10] The Commission's reasonable interpretation of the statute here has been sanctioned by congressional acquiescence. The deference afforded to an agency's interpretation of its governing statute is especially great where the "agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects." *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-89 (1940)). As petitioners point out, Congress in enacting the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), indicated that it was aware of the Commission's forbearance policy and adopted amendments to Title II of the Act that are premised on the existence of that policy. *See* 47 U.S.C. § 226(h) (Supp. III 1991)(requiring certain carriers to file informational tariffs).

[11] 47 U.S.C. § 151.

ress toward that goal: Consumers had virtually no choice among carriers and service offerings; business users were limited in their ability to procure customized telecommunications services; potential competitors faced almost insurmountable barriers to entry; and service providers were restricted in their ability to offer innovative, customer-oriented products. To find a more effective means of fulfilling its statutory mandate, the Commission set out to develop a regulatory structure that would promote competition in the marketplace in order to better ensure the reasonableness of carrier rates.[12]

One cornerstone of the resulting structure is the Commission's forbearance policy.[13] Under permissive detariffing, carriers that face effective competition are not required to publish their rates in tariffs filed with the Commission. Initially, the Commission applied this policy only to resellers (entities that resell the facilities of others).[14] In 1983, the Commission extended the forbearance policy to nondominant facilities-based carriers.[15] Since that time, the telecommunications industry has been transformed. Increasingly over the last ten years, service providers, resellers, and business users alike have been free to negotiate agreements for telecommunications services so that today they are constrained only by market forces. These agreements, which allow providers to tailor their offerings to the needs of individual users, have played a key role in creating today's vibrant competitive market-

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[12] *See Competitive Carrier Further Notice*, 84 F.C.C.2d at 456, 471.

[13] *See Competitive Carrier Fourth Report*, 95 F.C.C.2d at 554.

[14] *See Competition Carrier Second Report*, 91 F.C.C.2d at 61-62 & n.7.

[15] *See Competitive Carrier Fourth Report*, 95 F.C.C.2d at 578.

place for telecommunications services and in making possible "the consumer benefits that have resulted" from it.[16]

As the Commission has found, mandatory tariffing in a fully effective marketplace would impede, rather than promote, competition. Requiring competitive sellers to file tariffs would introduce price and service rigidity by making it difficult for the sellers to respond rapidly to market forces.[17] The administrative cost associated with tariff filing would discourage market entry and inordinately burden small resellers.[18] Extending mandatory tariffing to nondominant carriers would facilitate collusive pricing practices.[19]

By contrast, permissive detariffing creates an environment in which real price and service competition may thrive. Since the introduction of permissive detariffing, competition among nondominant carriers has flourished.[20] Domestic carriers and resellers now provide inexpensive, customer-oriented telecommunications products and services nonpareil. With the benefit of these telecommunications products and services, business users have been able to enhance their competitiveness by implementing advanced

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[16] *Tariff Filing Requirements for Interstate Common Carriers* ("*Rulemaking Order*"), 7 FCC Rcd 8072, 8079 (1992).

[17] *See Competitive Carrier Second Report*, 91 F.C.C.2d at 62.

[18] *See id.* at 65.

[19] *See Competitive Carrier Fourth Report*, 95 F.C.C.2d at 556 n.3. This Court has similarly found that the advance publication of prices in a fledgling market "tends toward price uniformity" and competitive stagnation. *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969).

[20] *See Rulemaking Order*, 7 FCC Rcd at 8079-80 (detailing expansion of nondominant interexchange carrier market); *see also Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5881 (finding that growth of competition in business services segment warrants regulatory changes), *recon.*, 6 FCC Rcd 7569 (1991), *further recon.*, 7 FCC Rcd 2677 (1992).

management practices, such as "just-in-time" inventory control and distributed information sharing. Thus, permissive detariffing significantly contributes to the efficiency of the many industries that rely heavily on telecommunications.

Likewise, permissive detariffing furthers the statutory goal of ensuring that rates remain "just and reasonable."[21] The competitive forces unleashed by the forbearance policy have driven the rates for interstate telecommunications services steadily downward.[22] In this marketplace, any firm that seeks to charge rates that are unreasonable or discriminatory is checked by the most decisive regulatory tool available: a robust competitor.

B. The Decision Below Would Cause Significant Harm to U.S. Industry.

The present case illustrates the importance of adhering to the principles articulated in *Chevron*. By substituting its judgment for that of the expert agency, the court below would radically alter the marketplace for telecommunications services and, in turn, handicap the competitiveness of businesses that depend on such services.

The Commission's rules presently characterize both facilities-based carriers and resellers as common carriers subject to regulation under Title II of the Act. Thus, not only would facilities-based carriers such as MCI or Sprint have to file tariffs, but hundreds of small resellers would also be so obliged. The burden of this obligation would fall disproportionately on the smallest providers. These service providers, who would most feel the added administrative costs, typically rely on flexibility and market responsiveness as their primary competitive weapons. Increased cost and reduced flexibility for providers would mean higher prices and more limited service options for users, across the spectrum of American industry.

In invalidating the permissive detariffing policy, the court below has removed an essential element of the highly successful, established regulatory policy on which important investment and business decisions have been based. Service providers and large telecommunications customers such as IBM have structured their businesses around existing negotiated service contracts. The lower court's decision creates uncertainty about the lawfulness of these contracts with regard both to their continuing force and the potential ramifications of their being found unlawful. Unless dispelled by this Court, such uncertainty would translate into transaction costs as market participants attempt to anticipate and adapt to the more restrictive environment the decision below contemplates.

In short, the important issue of the validity of permissive detariffing has not been, but should be, resolved by this Court.

CONCLUSION

For these reasons and those set forth in the petitions for certiorari of the United States and MCI, the petitions should be granted.

Respectfully submitted,

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[21] *See* 47 U.S.C. § 201(b). In appropriate circumstances, the Commission may rely on an active and competitive marketplace as a substitute for direct regulation. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981)(market forces will adequately produce diversity in entertainment programming); *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984)(market circumstances for satellite transponder service obviate direct regulation).

[22] *See Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7378 (1992), *recon.*, FCC 93-378 (released Sept. 2, 1993).